VZCZCXRO5397
RR RUEHAG RUEHDA RUEHDBU RUEHDF RUEHFL RUEHIK RUEHKW RUEHLA RUEHLN
RUEHLZ RUEHROV RUEHSR RUEHVK RUEHYG
DE RUEHYE #1419/01 2840911
ZNR UUUUU ZZH
R 110911Z OCT 06
FM AMEMBASSY YEREVAN
TO RUEHC/SECSTATE WASHDC 4132
RUEAWJA/DEPT OF JUSTICE WASHDC
INFO RUCPDOC/DEPT OF COMMERCE WASHDC
RUEHZL/EUROPEAN POLITICAL COLLECTIVE

UNCLAS SECTION 01 OF 03 YEREVAN 001419

SIPDIS

SENSITIVE

SIPDIS

STATE FOR INL, EUR/ARM
DOJ FOR OPDAT/LEHMANN AND NEWCOMBE

E.O. 12958: N/A
TAGS: PGOV SNAR KCRM KJUS AM
SUBJECT: ARMENIA NARROWLY AVOIDS A MAJOR MISSTEP IN PROPOSED LEGAL REFORM FOR USING EXPERT WITNESSES

Sensitive but unclassified. Please protect accordingly.

Summary

¶1. (SBU) A recent attempt by the Armenian Ministry of Justice to propose judicial reforms in the chaotic area of expert witnesses came perilously close to making a bad situation worse in criminal, civil, and administrative legal proceedings. During the week of September 11-15, 2006, representatives sent by the U.S. Department of Justice persuaded the Minister of Justice to reject poorly drafted legislation that would have revamped the Armenian system for regulating, qualifying, and using experts in all areas of expertise, from toxicology and ballistics, to copyright and economics. End Summary.

DOJ Legislative Experts Engage Justice Minister
---------- --

¶2. (SBU) The Department of Justice Office of Overseas Prosecutorial Development, Assistance and Training (DOJ/OPDAT) Resident Legal Advisor (RLA) Cynthia Lie, posted to Embassy Yerevan and Jeffrey Kahn, former DOJ Attorney and current Law Professor at Southern Methodist University School of Law, met repeatedly with the Minister of Justice (MoJ) Davit Harutyunyan, the Deputy Minister Ashot Abovian, and the Ministry's legislative team. The RLA and Professor Kahn successfully persisted throughout the meetings in the position that Armenian legal reform needed to steer in the direction of compliance with Armenia's binding legal obligations as a party to the European Convention on Human Rights (ECHR).

Background: Old Habits Die Hard

¶2. (SBU) Scratch the surface of legal reform in Armenia, as in many post-Soviet republics, and you'll find that change is often only skin deep. The toughest change for prosecutors to accept has been their new, and appropriate, designation as partisans in criminal proceedings that they formerly ruled as so-called "neutral" providers of objective truth. Thanks to Armenia's entry into the Council of Europe and ratification of the ECHR, the new Armenian Criminal Procedure Code (CrPC) recognizes prosecutors and their investigators as only one side in an adversarial process that promises equality of arms to both sides. Previously, the criminal dossier compiled by the state - full of hearsay witness statements and the often determinative reports of the state's forensic experts - was all that the court needed for trial. Indeed, prosecutors frequently didn't bother to show up for trial once the dossier had been submitted ex parte to the judge, long before the defendant and his counsel even made their appearances in court.

¶3. (SBU) The New CrPC and the availability of an appeal at the European Court in Strasbourg was supposed to change all that. This classically inquisitorial process, heavily dependent on the prosecution's compilation of the dossier or case file, a Soviet legacy, is now balanced by greater procedural guarantees of equality for the defense. The dossier is formally recognized as the partisan product of only one side, rather than the objective presentation of facts and the merits of a case. Defendants can request the presence of their own lawyer at many stages of the investigation. And the lawyer can request that his own questions be put to experts engaged by the state. These rights are ostensibly protected by the opportunity for the defense to move the court for the inclusion or exclusion of evidence in the dossier, a new expert report, and even a change of experts.

¶4. (SBU) But old habits die hard. Despite changes in the CrPC and other statutes, the dossier still holds tremendous power as the focal point for the presentation of nearly all evidence in a trial. "I'm your best defender," one senior criminal investigator likes to tell defendants called to his interrogation rooms. And it is this worldview, apparently unshaken by formal changes to the law, that still infects the criminal process. A defense counsel's request for a new or different expert - let alone the defendant's independent collection of evidence - is an insult to a self-described "neutral," being the investigator. And an acquittal - should such an event occur - is an earth-shattering blow to his or her sense of professionalism. In addition to professionalism concerns, in Armenia, as well as, in other post Soviet countries, law enforcement (including prosecutors) are rated heavily based on how many cases they open and close (i.e., quantity vs. quality).

Is There Such a Thing as "Free Choice"?

¶5. (U) The MoJ recently sought to strengthen existing reforms by revamping the way experts are regulated, selected, and used in judicial proceedings. Expert reported conclusions are often given considerable deference by the court. The MoJ started from the premise that both sides should have equal access to, and a free choice of, experts. So far, so good. But just what is an expert?

¶6. (SBU) Rather than let the market sift the good from the bad, or rely on judges to assess the credentials and credibility of experts presented by either party, the MoJ drafted a "Law on Forensic Examinations." On its face, the draft law would have regulated all of these issues. The state would license all experts and establish an official state body to administer qualifications tests in any of more than a score of areas of expertise, from toxicology to ballistics to economics to copyright. Further, the state would certify the reliability of all "methodologies" employed by all experts. Various forms of malfeasance by experts defined in the draft law could result in license revocation, de-qualification proceedings, or even criminal penalties. This would only exacerbate the already existing heavily State controlled and pro-prosecution system, as the Armenian Criminal Procedure currently only allows the prosecution's witness to be deemed an "expert", while the defense can only hire a "specialist", whose reports and testimony cannot even be considered as evidence under the current CrPC in some circumstances. The foregoing is also arguably in contravention of the ECHR's mandate of equality of arms.

¶7. (SBU) The MoJ sought guidance on this draft from the Department of Justice Resident Legal Advisor (RLA). The RLA and Professor Kahn advised that the draft law should not be ratified. The proposed testing and licensing regime was not only an open invitation for rent-seeking and corruption, it was duplicative of state licensing for the most commonly used types of experts: medics, psychologists, and other skilled professionals. Worse, rather than enhance protections for the defendant's right to choose an expert, the proposed layer of bureaucracy potentially opened a new mechanism to disallow a defendant's preferred expert witness - revoking his license. Deputy Minister Abovian expressed resistance to allowing both prosecution and defense the opportunity to provide their own

witness testimony to the court, arguing that most of the Armenian judges were not trained well enough to handle the responsibility of determining if a witness was qualified to serve as an expert. Therefore, he preferred a state controlled board that would provide that function. The Resident Legal Advisor and Professor Kahn consistently pressed the point that the judges should be trained and that the process of deciding a qualified expert should be a public, open-court process that allows both sides to present their expert, rather than a behind the scenes board or individual who makes the decision. Ultimately, the MoJ agreed.

"Without the ECHR, a lawyer isn't a lawyer."

¶8. (SBU) Any attempt to remake the Armenian justice system in the image of the American adversarial system would be doomed at the start, and rightly so. American practices have a history and a learning curve all their own, and are inappropriate if not refined to accommodate the civil law system of justice and the unique challenges posed by the legacy of the Soviet Union's adulteration of the Continental legal tradition. Fortunately, the ECHR system provides a series of templates - developed through 50 years of case law produced by the Strasbourg Court - that can serve as a persuasive guide towards a European-style merging of these traditions with more adversarial practices and equality of arms for both sides.

¶9. (U) Defense attorneys in Armenia instinctively recognize how the ECHR mandates equality of arms in legal proceedings. "Without the ECHR, a lawyer isn't a lawyer," said Ruben Sahakyan, head of the Armenian Chamber of Advocates, during a meeting with the Resident Legal Advisor and Professor Kahn on September 13, 2006. The ECHR caselaw provides a fulcrum for the argument that defense attorneys should have equal rights to examine experts employed by the state and to employ their own expert witnesses. ECHR caselaw has also been the primary catalyst for Armenian legal reform since Armenia joined the Council of Europe and became a party to the ECHR in 2002. To date, the Court in Strasbourg declared approximately 34 Armenian cases admissible for a ruling on their merits. However, the trend of increasing applications makes more acceptances imminent. In 2003, the ECHR received 89 applications from Armenian petitioners to review alleged violations of the Convention. In 2004, petitioners lodged 122 applications; and by 2005, the number had nearly tripled to 340 applications.

Comment

¶10. (SBU) Throughout the MoJ working sessions on the draft law, OPDAT's Resident Legal Advisor and Professor Kahn returned to Armenia's binding legal obligations under the European Convention on Human Rights, ECHR caselaw, the American system which embodies the same core principles of the ECHR, and examples of how other post-Soviet countries had adapted their traditional practices to these European standards. This approach ultimately won the day in a final one-on-one with the Minister of Justice. OPDAT's team succeeded in persuading Minister Harutyunyan to scrap the draft law on forensic examinations and retask his staff to consider ECHR-compatible reforms that would promote equal access to expert witnesses with less state intrusion into an inherently judicial process of weighing evidence. The MoJ agreed that the defendant should be able to select his own "expert" to be heard at trial and that if a person could not afford an expert of his own, that the State should pay for the defendant's expert. With the help of OPDAT, the MoJ avoided a perilous misstep. Legal reform, at least in this area, appears to be back on track and moving in the right direction.

GODFREY